



## National Security Legislation Amendment Bill 2010

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# National Security Legislation Amendment Bill 2010

**Date introduced:** 30 September 2010

**House:** House of Representatives

**Portfolio:** Attorney-General

**Commencement:** To ensure that there is some prior notice before the new offence provisions commence, there are a number of commencement dates. Refer to the table in section 2 of the Bill for details.

Schedule 1 (Part 1), Schedule 2 (Parts 1 and 2), Schedules 3-7 and 9 will commence on the day after Royal Assent.

Schedule 1 (Part 2), Schedule 8 (items 1 to 16, 18-102, 104-106 and 108-110) will commence the 28<sup>th</sup> day after Royal Assent.

Schedule 8, item 103 will commence on a single day to be fixed by Proclamation or within 6 months of the beginning of the day of Royal Assent.

Schedule 8, items 17 and 107 will commence at the same time as the provisions covered by item 103 of Schedule 8.

Schedule 10 will commence on the later of the day after Royal Assent and the commencement of the *Parliamentary Joint Committee on Law Enforcement Act 2010*.

**Links:** The links to the [Bill, its Explanatory Memorandum and second reading speech](#) can be found on the Bills home page, or through <http://www.aph.gov.au/bills/>. When bills have been passed they can be found at the ComLaw website, which is at <http://www.comlaw.gov.au/>.

## Purpose

The purpose of the Bill is to implement a number of reforms to Australia's national security legislation, first announced by the Government in August 2009. The reforms implement the Government's response to several independent and parliamentary committee reviews of Australian national security and counter-terrorism legislation.<sup>1</sup>

The Bill will primarily make amendments to the following existing Acts:

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1. Some recommendations from these reviews are implemented in this Bill: *Inquiry by the Hon John Clarke QC into the case of Dr Mohammed Haneef (November 2008)*; *Inquiry into the proscription of 'terrorist organisations' under the Australian Criminal Code by the Parliamentary Joint Committee on Intelligence and Security (September 2007)*; *Review of Security and Counter-Terrorism Legislation by the Parliamentary Joint Committee on Intelligence and Security (December 2006)*; and *Review of Sedition Laws in Australia by the Australian Law Reform Commission (July 2006)*.

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*Criminal Code Act 1995 (Criminal Code)*

*Crimes Act 1914 (Crimes Act)*

*Charter of the United Nations Act 1945 (Charter Act)*

*National Security Information (Criminal and Civil Proceedings) Act 2004 (NSI Act)*

*Inspector-General of Intelligence and Security Act 1986 (IGIS Act)*

## Background

An earlier version of the National Security Legislation Amendment Bill 2010 (the Bill) was introduced into the House of Representatives during the 42nd Parliament. However, that version of the Bill lapsed on 19 July 2010 on the proroguing of Parliament. This Bill substantially replicates the earlier Bill.

The Bill has been the subject of extensive consideration. In August 2009, the Government released a [Discussion Paper](#)<sup>2</sup> seeking submissions on the legislative measures contained in this Bill. Submissions in response to the Discussion Paper can be found [here](#).<sup>3</sup> In his second reading speech to the 42<sup>nd</sup> Parliament, the Attorney-General said that the ‘Government has taken into account some valuable suggestions made by those who provided feedback on the proposals’.<sup>4</sup>

The Bill contains amendments that seek to achieve:

a balance between the Government’s responsibility to protect Australia, its people and its interests and instilling confidence in the community that the national security and counter-terrorism laws will be exercised in an accountable way, protecting key civil liberties and the rule of law. As the [former] Prime Minister outlined in Australia’s first National Security Statement, this balance represents a continuing challenges of all modern democracies<sup>5</sup>

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2. See: [http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(966BB47E522E848021A38A20280E2386\)~SLB+-National+Security+Discussion+Paper.pdf/\\$file/SLB+-+National+Security+Discussion+Paper.pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(966BB47E522E848021A38A20280E2386)~SLB+-National+Security+Discussion+Paper.pdf/$file/SLB+-+National+Security+Discussion+Paper.pdf), viewed 27 October 2010
  3. See: [http://www.ag.gov.au/www/agd/agd.nsf/Page/Consultationsreformsandreviews\\_Nationalsecuritylegislation-Publicconsultation\\_SubmissionstotheNationalSecurityLegislationPublicConsultation](http://www.ag.gov.au/www/agd/agd.nsf/Page/Consultationsreformsandreviews_Nationalsecuritylegislation-Publicconsultation_SubmissionstotheNationalSecurityLegislationPublicConsultation), viewed 20 October 2010
  4. Second reading speech to 42<sup>nd</sup> Parliament, p. 2920, viewed 20 October 2010, [http://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansardr/2010-03-18/0039/hansard\\_frag.pdf;fileType=application%2Fpdf](http://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansardr/2010-03-18/0039/hansard_frag.pdf;fileType=application%2Fpdf). The earlier speech was referred to by the Attorney-General in his second reading speech to this Parliament: See second reading speech, p. 273, [http://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansardr/2010-09-30/0041/hansard\\_frag.pdf;fileType=application%2Fpdf](http://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansardr/2010-09-30/0041/hansard_frag.pdf;fileType=application%2Fpdf)
  5. ‘National Security Legislation, Discussion on Proposed Amendments’, July 2009, Attorney-General’s Introduction, viewed 18 October 2010,

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However, the Bill arguably only scratches the surface of the legislative reform that could have been embarked upon. The Bill implements some significant changes recommended by the Clarke Inquiry and older Parliamentary Committee inquiries but does not address long-standing controversial aspects of Australia's counter-terrorism laws such as the:

- control orders regime
- process of proscribing terrorist organisations (only one aspect is addressed)
- terrorist organisation offences (only minimally addressed in this Bill).<sup>6</sup>

The changes that are proposed in the Bill are not without controversy. Most notably, the amendment to cap the period of pre-charge detention at 7 days was opposed by 18 submissions to the Government's [Exposure Draft](#) of the provisions. Further, the Senate Committee on Legal and Constitutional Affairs has recommended that the:

Australian Law Reform Commission conduct a public inquiry into the pre charge detention regime. This review should examine, among other things, what period of pre charge detention is 'reasonably necessary' to balance the competing interests of criminal investigations and individuals' right to liberty, as well as a straightforward legislative framework for a pre charge detention regime.<sup>7</sup>

In his second reading speech, the Attorney-General stated that the Government has decided to agree to this recommendation 'in principle' and that his Department:

...will arrange a broader review of pre-charge detention once there has been further operational use of, and experience with, the provisions in Part 1C of the Crimes Act.<sup>8</sup>

Since 2001 and more aggressively since 2004, there has been discontent amongst media, academics and the public about the use and application of anti-terrorism laws. Balancing individuals' rights with national security interests is a challenge for any legislature. To date:

... without becoming complacent, we should remind ourselves that, so far, our intelligence and police agencies have been remarkably effective in detecting and preventing acts of terrorism in the planning and preparation stages, and intervening to protect the public.<sup>9</sup>

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[http://www.ag.gov.au/www/agd/agd.nsf/Page/Consultationsreformsandreviews\\_Nationalsecuritylegislation-Publicconsultation\\_Nationalsecuritylegislation-Publicconsultation](http://www.ag.gov.au/www/agd/agd.nsf/Page/Consultationsreformsandreviews_Nationalsecuritylegislation-Publicconsultation_Nationalsecuritylegislation-Publicconsultation).

6. See overview of submissions from, for example, the Law Council of Australia and the Gilbert and Tobin Centre for Public Law in response to the Discussion Paper in Senate Legal and Constitutional Affairs Committee report, National Security Legislation Amendment Bill 2010 (Provisions), Parliamentary Joint Committee on Law Enforcement Bill 2010 (Provisions), June 2010 (Senate Legal and Constitutional Affairs Committee report), pp. 16, 17.
7. Ibid., recommendation 3, p. 55.
8. Second reading speech, op. cit.,
9. 'A calmer strategy against terrorism', *Sydney Morning Herald*, 24 February 2010, p. 10.

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While this may be true, and this Bill enhances and improves many procedures relating to the early detection and prevention of terrorist acts, there is still much that could be reviewed and improved in the prosecution and in the courts' consideration of terrorism matters.

## Committee consideration

The Bill introduced into the 42<sup>nd</sup> Parliament was referred to the Senate Legal and Constitutional Affairs Committee for inquiry and report by 17 June 2010. Details of the Committee's inquiry and report are [here](#).

During the term of the 42<sup>nd</sup> Parliament the Senate Standing Committee for the Scrutiny of Bills also considered the Bill. The Committee's report on the Bill is [here](#).

This Bills Digest draws on the views of both Committees.

## Position of major interest groups

This Bill, and the preceding Discussion Paper, has attracted substantial commentary from various interest groups over the last 12 months. Some of this has been in the form of formal submissions to the Attorney-General's Department in response to the Discussion Paper and overall, there is support for the Bill. However, as Nicola McGarrity from the Gilbert & Tobin Centre for Public Law has noted 'it is not good enough to consider the laws as a whole. Each change – especially one that strengthens the offences or gives new powers to law enforcement and intelligence agencies must be rigorously scrutinised on its own merits'.<sup>10</sup>

Since coming in to Government in 2007, the Australian Labor Party has not introduced any major national security or anti-terrorism reforms. Notably though, the Government has introduced legislation that operates on the periphery of anti-terrorism laws such as offences relating to aviation security and serious and organised crime. Commentary following the release of the Clarke Inquiry suggested that the Government needed to make some significant changes. It would appear that there is consultation and consideration occurring that has not yet resulted in legislation. In its submission to the Senate Committee, the Department said that the Bill is mainly in response to previous inquiries and that:

It is by no means the end of the process. It is obviously an ongoing process of review and reform.<sup>11</sup>

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10. N McGarrity, 'Freedoms are losing out to fear', *The Age*, 14 August 2009, viewed 26 October 2010, <http://www.theage.com.au/opinion/freedoms-are-losing-out-to-fear-20090813-ejst.html>

11. Senate Legal and Constitutional Affairs Committee report, op. cit., p. 17.

## Financial implications

The Explanatory Memorandum states that this Bill has no direct financial impact on Government revenue.<sup>12</sup>

## Main issues

### Treason and sedition (urging violence)

The Bill will expand the existing sedition offences (to be renamed offences that 'urge violence') to also cover urging force or violence on the basis of 'ethnic' or 'national' origin.

In implementing a number of recommendations from reviews done by parliamentary committees and the Australian Law Reform Commission, the Government has sought to reframe the treason offence and insert a new offence to replace the offence of sedition, namely the offences of urging violence against groups or members of groups.

The Senate Committee on Legal and Constitutional Affairs report recommended that the Attorney-General's Department revise and reissue the Explanatory Memorandum to the Bill 'to clarify the reasons for including **proposed sections 80.2A and 80.2B** in Chapter 5 of the Criminal Code'.<sup>13</sup> The Department has responded that:

While the offences in sections 80.2A and 80.2B, in effect, condemn ethno-racially or religiously motivated discrimination, their primary purpose is to criminalise the urging of force or violence as opposed to conduct which offends, humiliates, insults or ridicules a person on specified grounds. They are serious offences targeting conduct that has the potential to impact on the security of the Commonwealth. They are therefore appropriately located in Chapter 5 of the Criminal Code.<sup>14</sup>

The Department has inserted an additional paragraph in the Explanatory Memorandum reflecting this response and noting that:

The offences have been carefully drafted to capture conduct that is criminally culpable. It is desirable for these offences to be located with related offences in Chapter 5 of the Criminal Code.<sup>15</sup>

This suggests that it is unlikely that any amendments will be made to the placement of these provisions.

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12. Explanatory Memorandum, p. 2.

13. Senate Legal and Constitutional Affairs Committee, op. cit, recommendation 1, p. 55. Chapter 5 of the Criminal Code relates to 'The Security of the Commonwealth'.

14. Senate Legal and Constitutional Affairs Committee Report, p. 27.

15. Explanatory Memorandum, p. 10.

## Listing of terrorist organisations (Part 5.3 of the *Criminal Code*)

The amendments to Part 5.3 of the Criminal Code include extending the duration of listings from 2 to 3 years. The second reading speech notes that a majority of the States and Territories have agreed to these proposed amendments to part 5.3 of the Criminal Code in accordance with the Inter-Government Agreement on Counter-Terrorism Laws.<sup>16</sup>

## Investigation powers under Part 1C of the *Crimes Act 1914*

Responding to issues raised in the Clarke Inquiry into the Case of Dr Mohamed Haneef, amendments to Part 1C will clarify what time can be excluded from the investigation period for terrorism and non-terrorism offences. The detail of these provisions is considered at page 10 of this Digest.

## Enhanced police powers to investigate terrorism

Some state and territory police presently have entry powers without a warrant in certain circumstances.<sup>17</sup> However, there is currently not sufficient coverage for the AFP to lawfully enter premises without a warrant in emergency circumstances, such as to prevent a terrorist attack. The AFP needs to be able to effectively respond to potential national security incidents or where there is a risk to the health or safety of the public. It is somewhat surprising that an unambiguous power to do so does not already exist in the terrorism law landscape. However, as the Sydney Centre for International Law pointed out:

the use of police warrants has traditionally been an essential device to curtail arbitrariness in the pursuit of law enforcement and public safety goals. The requirement for a warrant ensures that the execution of warrants by one arm of government is supervised by another, as well as ensuring that adequate reasons are furnished that support substantial interferences with privacy.<sup>18</sup>

Liberty Victoria, in its submission to the Senate Committee's Inquiry into the Bill, was also unresponsive of the existing drafting in the Bill to enhance the AFP's power, noting in particular that there is no evidence that not having this power has proved detrimental to terrorism investigations. Further, 'given the abuse of existing powers by security authorities, notably in the Dr Haneef affair, there is no certainty that the grant of this power without oversight would not be abused'.<sup>19</sup>

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16. Second reading speech, p. 4.

17. For example: section 190, *Crimes Act 1900* (ACT), section 22, *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW)

18. Sydney Centre for International Law, Submission to the Senate Committee on *Legal and Constitutional Affairs Inquiry* into the National Security Legislation Amendment Bill 2010, submission 6, p. 22.

19. Liberty Victoria, Submission to the Senate Committee on *Legal and Constitutional Affairs Inquiry* into the National Security Legislation Amendment Bill 2010, submission 8, p. 3, viewed 18 October 2010, [http://www.aph.gov.au/Senate/committee/legcon\\_cte/National\\_Security\\_Legislation/submissions.htm](http://www.aph.gov.au/Senate/committee/legcon_cte/National_Security_Legislation/submissions.htm)



However, the Bill proposes some safeguards against this, requiring the police to obtain a search warrant if there are grounds to conduct *further* searches and seize evidence.

The attention of the Scrutiny of Bills Committee was also drawn to this enhanced power. The Committee's comments are dealt with in more detail in the Key Provisions section of this Digest.

The Senate Legal and Constitutional Affairs Committee made no recommendations or comments on this particular issue. The dissenting reports from Committee members also made no comment on this issue in the Bill.

## **Bail provisions for terrorism offences**

For consistency, and to avoid confusion, this Bill will insert a specific right of appeal for both the prosecution and the defendant in section 15AA of the Crimes Act. Presently, state and territory legislation is relied upon for bail applications relating to Commonwealth criminal matters. This creates inconsistencies and confusion in the application for bail. The amendments will allow for an appeal to be heard by a court of an appellate jurisdiction.

## ***Charter of the United Nations Act 1945***

The United Nations Resolution 1373 of 28 September 2001 obliges Australia to freeze a person's assets if they are associated with terrorist activity.<sup>20</sup> The Parliamentary Joint Committee on Intelligence and Security Report *Review of Security and Counter-Terrorism Legislation (2006)*<sup>21</sup> recommended that the standards be improved for listing a person, entity, asset or class of assets.

The Bill will amend the Charter Act to require that the Minister for Foreign Affairs be satisfied on 'reasonable grounds' of the prescribed matters. Further, the listing of a person or group will cease to have effect on the third anniversary from its first day of being in effect.

## **Court procedures relating to disclosure of national security information**

This Bill proposes amendments to the *National Security Information (Criminal and Civil Proceedings) Act 2004* (NSI Act) that will limit the disclosure of national security material in a trial to a greater degree than is currently permitted. The Government has noted that the courts have upheld the constitutionality of relevant subsections of the NSI Act observing that the provisions do not threaten the court's rightful control over the trial to ensure the accused is not tried unfairly.<sup>22</sup> The Discussion

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20. See: <http://domino.un.org/UNISPAL.NSF/0/392a001f254b4b9085256b4b00708233?OpenDocument>, viewed 18 October 2010

21. See: <http://www.aph.gov.au/house/committee/pjcis/securityleg/report.htm>, viewed 18 October 2010

22. R v Faheem Khalis Lodhi [2006] NSWSC 571

Paper noted that the decision in *Lodhi* 'reinforced the integrity of the fundamental principles underlying the Act'.<sup>23</sup> Nonetheless, it is argued that:

by invoking a claim of "national security", government lawyers can produce secret material in affidavits which can be kept from defence lawyers. Judge and magistrates are allowed to have access to this secret material and can make decisions based on it without having to give the person charged or being investigated a chance to respond. The federal government can also be represented in any terrorism trial and they can prevent defence lawyers from asking questions without getting the written approval of the Attorney-General if the question is deemed to be entering into the territory of "national security".<sup>24</sup>

Further, in relation to the amendments to the NSI Act more generally:

The definition of national security is delightful. "National security information means information (a) that relates to national security (b) the disclosure of which may affect national security."

That just about covers it. We're fast losing the things about which Pig-Iron Bob warned us in 1939.<sup>25</sup>

### ***Inspector-General of Intelligence and Security Act 1986***

The breadth and scope of intelligence and security matters is such that the Inspector General of Intelligence and Security (IGIS) requires to consider the role played by a Department or Agency that is not part of the Australian Intelligence Community (AIC). The amendments in this Bill will allow the IGIS to inquire into any department or agency's intelligence or security matter.

## **Key provisions**

### **Schedule 1 – Treason and urging violence**

The amendments in this Schedule are mostly to Part 5.1 (Treason and Seditious) of the *Criminal Code Act 1995*. **Item 15** will insert a new offence after section 80.1 of the Criminal Code. **Proposed section 80.1AA** will create a new offence of assisting enemies at war with the Commonwealth. This is a new offence for treason, following the repeal of the existing paragraphs 80.1(1)(e) and (f) of the Code. The framing of this new offence is implementing recommendations made by the Parliamentary Joint

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23. Discussion Paper, p. 173.

24. G Barns, 'Our secret shame', *Hobart Mercury*, 5 April 2010, p. 12

25. R Ackland, 'Warnings may be old but we haven't learnt our lessons', *smh.com.au*, 4 June 2010, <http://www.smh.com.au/opinion/politics/warnings-may-be-old-but-we-havent-learnt-the-lessons-20100603-x58l.html>

Committee on Intelligence and Security and the Australian Law Reform Commission. **Proposed new paragraphs 80.1AA(1)(a)–(c)** will provide that a person commits an offence if:

- the Commonwealth is at war with an enemy (whether or not the existence of a state of war has been declared)
- the enemy is specified, by Proclamation to be an enemy at war with the Commonwealth
- the person intends that the conduct will *materially assist* (real or concrete assistance)<sup>26</sup> the enemy to engage in war with the Commonwealth; and
- the conduct assists the enemy to engage in war with the Commonwealth.

Proposed **new paragraphs 80.1AA(1)(f)** and will require that when the person engages in conduct that does materially assist the enemy to engage in war with the Commonwealth, the person must be:

- a citizen; or
- resident of Australia; or
- must have voluntarily put himself or herself under the protection of the Commonwealth; or
- is a body corporate incorporated under a law of the Commonwealth or of a state or territory.

The penalty for this offence is life imprisonment.

**Proposed subsection 80.1AA(2)** will enable a Proclamation under subsection 80.1AA(1) to take effect before the day on which it is registered under the *Legislative Instrument Act 2003*, although not before the day it is made. The usual situation is that an instrument takes effect upon registration under the *Legislative Instruments Act*.

In considering this provision, given the serious nature of the offence, the Senate Standing Committee on the Scrutiny of Bills sought the Attorney-General's advice on:

The justification for this approach and whether the legislation may provide for other mechanisms by which the public may be adequately notified of a Proclamation ... especially in the period before its registration under the *Legislative Instruments Act*.<sup>27</sup>

In response, the Attorney-General indicated that it was appropriate for the specific enemy to be identified and proclaimed under subordinate legislation, and that it would not be possible in the necessary timeframe to do this by way of an amendment to the Act.<sup>28</sup>

The Attorney-General also noted that in time of war, it would be impossible to predict how communications, including electronic communications would be affected, and tying the

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26. Explanatory Memorandum, p. 8.

27. Senate Standing Committee on the Scrutiny of Bills, op. cit., p. 268.

28. Ibid., p. 269.

commencement of a Proclamation to its publication under the Legislative Instruments Act 'might defeat the intended operation of the offence'.<sup>29</sup>

The Attorney-General also noted that section 80.1AA requires the Government to make an accountable decision that Australia is at war with the enemy specified in the Proclamation, and that this would have to be proved beyond reasonable doubt for a prosecution to succeed. Moreover, for a prosecution to succeed, it would be necessary to prove both that the person assists an enemy who is at war (declared or not) with the Commonwealth and that the enemy has been specified by Proclamation.<sup>30</sup>

Despite these arguments, the Committee remained concerned, maintaining its view that the publication of the Proclamation should be contemporaneous with its commencement. Additionally, the Committee considered that:

the public should be informed not only of the making of the Proclamation, but also of its effect (giving rise to a new criminal liability).<sup>31</sup>

The Committee sought an amendment to the Bill to address this concern.<sup>32</sup>

**Item 18** will insert a new offence to replace the existing sedition offence in subsection 80.2(1). This new offence will be committed if a person intentionally urges another person to overthrow the Constitution, the Government (including State and Territory governments) or the lawful authority of the Commonwealth government with the intention that force or violence will occur. The offence carries a penalty of 7 years imprisonment.

Similarly, **item 20** will create an offence of urging interference by force or violence with lawful processes for referenda<sup>33</sup>. Previously, the offence only covered Parliamentary elections but **proposed subsection 80.2(3)** will make it an offence to interfere with both processes. The penalty for this offence is 7 years imprisonment.

The Bill divides the amendments relating to urging violence into two parts, according to their commencement dates.

**Item 35** will insert new offences of 'urging violence against groups' and 'urging violence against members of groups'. **Proposed section 80.2A** will create an offence if a person urges another to use force or violence against a group, intending that force or violence will occur and reckless that the targeted group is distinguished by race, religion, nationality, national or ethnic origin or political opinion. The use of that force or violence must threaten the peace, order and good government of the Commonwealth; **proposed subparagraph 80.2A(1)(d)**. A lesser offence (with a 5 year

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29. Ibid.

30. Ibid.

31. Ibid., p. 270.

32. Ibid.

33. *Referendum* has the same meaning as in the *Referendum (Machinery Provisions) Act 1984* (**item 32**).

imprisonment penalty), not requiring the threat to peace, order and good Government is inserted in **proposed subsection 80.2A(2)**.

**Proposed section 80.2B** will insert a complementary specific offence against an individual member of a group, rather than groups. The fault element required for the identification of the targeted group (**paragraphs 80.2B(1)d**) and **paragraph 80.2B(2)(d)**) is recklessness. Similar to **proposed section 80.2A**, these offences will carry 7 years and 5 years imprisonment respectively, with the lesser penalty applying to the offence where no threat to the peace, order and good government is required.

To confirm that the offences in this Part are to apply to conduct occurring within Australia, **items 36** and **37** will make amendments to allow Category B extended jurisdiction (under section 15.2 of the Criminal Code) to apply.

## Schedule 2 – Terrorism

Amendments to Division 102 of the Criminal Code are made by Schedule 2. Part 1 of the Schedule will make a consequential amendment to paragraph 2(c) of section 9 (Refused Classification for publications, films or computer games that advocate terrorist acts) of the *Classification (Publications, Films and Computer Games) Act 1995* as a result of the change to the definition of ‘advocates’ under **item 2**.

**Item 2** will insert the word ‘substantial’ before risk to make it clear that where there is a risk that praise might have the effect of leading a person to engage in a terrorist act, then that praise must be real and apparent (i.e. significant); **proposed paragraph 102.1(1A)(c)**.

**Item 3** will change the automatic expiration date of the proscribing of an entity as a terrorist organisation under the Code. **Proposed subsection 102.1(3)** will change it from two years to three years, i.e. on the third anniversary of its commencement.

**Item 7** (Part 2 of Schedule 2) will facilitate the recognition of the new definition of ‘de facto partner’ in existing section 100.5 of the Criminal Code. This definition was an amendment to the *Acts Interpretation Act 1901* by the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – Superannuation) Act 2008*.

Similarly, **items 8-23** will revise existing definitions of these terms: ‘close family member’, ‘family member’, ‘child’, ‘parent’, ‘stepchild’ and ‘step-parent’. This is necessary in the context of terrorism offences because the association offences (subsection 102.8(4)) do not apply if the association is with any of these persons. For consistency with other Commonwealth laws, these definitions need to be updated.

**Items 20-23** will insert the definitions of ‘de facto partner’, ‘parent’ and ‘step-parent’ into the Dictionary of the Criminal Code.

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### Schedule 3 – Investigation of Commonwealth offences

The items in this Schedule will clarify the operation of the provisions of Part 1C of the *Crimes Act 1914*. The Explanatory Memorandum explains that the proposed amendments are in response to deficiencies in Part 1C identified in the Clarke report.<sup>34</sup> This Part outlines the investigation powers of law enforcement officers when a person has been arrested for a Commonwealth offence. The Schedule will:

- clarify the interaction between the power of arrest without warrant under section 3W (Power of arrest without warrant by constables) with the powers of investigation under Part 1C.
- set a maximum 7 day limit on the amount of time that can be specified by a magistrate and disregarded from the investigation period when a person has been arrested for a terrorism offence ('specified disregarded time')
- clarify how the investigation period and time that is disregarded from the investigation period are calculated, and
- clarify the procedures that apply when making an application to extend the period of investigation or apply for a period of specified disregarded time, including the enhancement of safeguards.<sup>35</sup>

Many of the amendments are to the definitions of existing terms in this Part. The following definitions are relocated, repealed and replaced or amended:

- 'arrested' (**item 1**)
- 'authorising officer' (**item 2**)
- 'investigation period' (**item 3**)
- 'judicial officer' (**item 4**).
- 'serious Commonwealth offence' (**item 5**)
- 'under arrest' (**item 6**)

**Item 9** will insert a note at the end of existing subsection 23C(1). This subsection allows the detention of a person only if the person is arrested for a Commonwealth offence that is not a terrorism offence. The new note will clarify that a person is not arrested for a Commonwealth offence if the person has been released under subsection 3W(2).<sup>36</sup> This amendment is one of a number of amendments that seek to clarify the relationship between section 3W and Part 1C (see **item 10**).

**Item 10** will repeal existing subsections 23C(2) and 23C(3) and replace them with **proposed new subsections 23C(2), (2A) and (3)**.<sup>37</sup> **Proposed new subsection 23C(2)** will clarify that a person may

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34. Explanatory Memorandum, p. 21.

35. Explanatory Memorandum, p. 21.

36. Subsection 3W(2) of the Crimes Act requires that an arrested person be released if the constable in charge of the investigation ceases to believe on reasonable grounds that the person committed the offence for which he or she was arrested.

37. Section 23C provides for the period of arrest if a person is arrested for a non-terrorism Commonwealth offence.

only be detained under that subsection while arrested for the Commonwealth offence. Further, **proposed paragraph 23C(2)(a)** will provide that a person may be detained for investigation purposes while arrested for the Commonwealth offence. This is then extended to the investigation of any other Commonwealth offence where there is a reasonable suspicion that it has been committed under **proposed paragraph 23C(2)(b)**. Once an investigation period has ceased, the person must no longer be detained (**proposed subsection 23C(2A)**).

By way of background, the Explanatory Memorandum states that:

If a person is arrested under subsection 3W(1) for a Commonwealth offence, subsection 3W(2) provides that if the constable in charge of the investigation ceases to hold a reasonable belief that the person has committed the offence then the person must be released. The Clarke report suggested it is possible for some to misinterpret the second limb of subsection 23C(2) to mean that once a person is arrested, the person can be detained under the second limb regardless of whether the requisite belief under section 3W is maintained.<sup>38</sup>

The complexities and confusion relating to the period of time that an arrested person can be detained for are addressed by **item 13. Proposed new subsection 23C(7)** will allow that in ascertaining time, any reasonable period of time can be disregarded during which questioning of the person is suspended or delayed. This subsection will clarify that questioning of the person may be suspended or delayed for one or more of the reasons outlined in paragraphs (a) – (l). To avoid doubt, **proposed subsection 23C(7A)** states that it is only when a person's questioning is suspended or delayed that time can be disregarded from the investigation period.

**Item 15** will repeal sections 23CA, 23CB, 23D, 23DA and 23E of the *Crimes Act*. These provisions relate to the investigation of both non-terrorism and terrorism offences. **Proposed sections 23D, 23DA, 23DB, 23DC, 23DD, 23DE and 23DF** will replace those sections and will clarify the conditions relating to the application, the extension and the time for detaining persons for investigation of these offences.

## Application to extend the investigation period

**Proposed subsection 23D(1)** will remove the ability of any justice of the peace or a bail justice to grant an extensions of the investigation period for non-terrorism offences. Such an application for extension can only be done through a magistrate; it can be done by telephone or in writing (**proposed subsection 23D(2)**). **Proposed new subsection 23D(3)** will insert new requirements for the application to facilitate the magistrate's consideration of an extension; this must be done within the constraints of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (**proposed subsection 23D(4)**).

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38. Explanatory Memorandum, pp. 24, 25.

## Extending the investigation period

**Proposed section 23DA** is applicable to non-terrorism offences and is based on existing section 23D(3). **Proposed subsection 23DA(6)** will insert a new requirement that an investigating official must provide the detained person or their legal representative with a copy of the instrument as soon as practicable.

## How the investigation period is calculated

**Item 16** will insert a drafting amendment to make a clear distinction between the detention powers in relation to terrorism and non-terrorism offences. This item will modify existing section 23CA by way of **proposed section 23DB**. This section will state that a person may only be detained under **proposed subsection 23CA(2)** while arrested for a terrorism offence. Note that 'arrested' is a defined term in the bill.

The amendments made by **item 16** are necessary to remove apparent uncertainty as to how the power of arrest (section 3W) interacts with existing section 23C. This item will insert a note to reinforce that under **proposed subsection 23DB(1)**, a person is not arrested for a terrorism offence if the person has been released under subsection 3W(2). **Proposed paragraphs 23DB(2)(b)** will provide that the person may, while arrested for the terrorism offence, be detained for the purpose of investigating whether the person committed another Commonwealth offence that an investigating official reasonably suspect the person has committed:

**Proposed paragraph 23DB(2)(b)** will enable investigators to pursue the investigation of both the terrorism and non-terrorism offences under the one regime. However the person will only be able to be investigated for a non-terrorism offence under the terrorism offence regime if the person is under a valid state of arrest for a terrorism offence. The proposed amendment will not enable the suspect to be detained, or an extension of the investigation period sought, only on the basis of investigating the non-terrorism offence. The amendment is simply designed to remove an arbitrary distinction that prevents the simultaneous investigation of terrorism and related non-terrorism offences while a person is arrested for a terrorism offence.<sup>39</sup>

**Proposed subsections 23DB(4)-(8)** set out the terms when an investigation period begins (at the time a person is arrested) and ends at a later time that is reasonable, not extending beyond 4 hours in most cases (**proposed subsection 23DB(5)**).

**Proposed subsection 23DB(9)** sets out the periods of time that may be disregarded in the calculation of the investigation period. If any of the events occur concurrently, any overlap is only to be disregarded once from the investigation period. A time period may also not necessarily be disregarded if suspending or delaying the questioning of the person is not necessary for the whole time. The Explanatory Memorandum uses communication with overseas countries as an example of

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39. Explanatory Memorandum, p. 31.



this. **Proposed paragraph 23DB(10)(a)** will not prevent police from resuming questioning of an suspect during this time but will not unduly affect the rights of the individual.<sup>40</sup>

**Proposed subsection 23DB(11)** will limit the number of days that can be disregarded from the investigation period. This is limited to 7 days. However, under **proposed paragraph 23DB(11)(a)**, if a person is arrested within 48 hours of a previous arrest, the maximum 7 day cap is reduced by any amount of time that was specified under section 23DD and disregarded under 23DB(9)(m).

**Proposed subsections 23DC and 23DD** will prescribe the process of applying for and determining a particular period of time that is then to be disregarded under **proposed paragraph 23DB(9)(m)**. The details in these subsections is extensive and, similarly with **proposed sections 23DE and 23DF** dealing with extending the time period, are thoroughly and clearly explained at pages 34-41.

## Schedule 4 – Powers to search premises in relation to terrorism offences

**Item 1** will repeal the existing heading and replace it with **Division 3A-Powers in relation to terrorist acts and terrorism offences**.

**Item 4** will insert **proposed new section 3UEA** which will allow a police officer to enter premises if the police officer suspects, on reasonable grounds, that such action is necessary to prevent a thing from being used in connection with a terrorism offence and it is necessary to do so without a search warrant because there is a serious and imminent threat to a person's life, health or safety (**proposed subsection 3UEA(1)**). The premises must not be secured for longer than is reasonably necessary to obtain the warrant (**proposed subsection 3UEA(4)**) and within 24 hours after the entry, the police officer must notify the occupier of the premises that the entry has taken place or leave written notification of the entry at the premises (**proposed subsection 3UEA(7)**).

In considering this proposed amendment, the Senate Scrutiny of Bills Committee noted that:

... there is no requirement that senior executive authorisation be required nor that the exercise of these powers be supervised by general reporting requirements to the Parliament.<sup>41</sup>

While acknowledging:

... the fine considerations it is sometimes necessary to balance to maintain both the security of the community and the protection of personal rights and liberties,<sup>42</sup>

the Committee sought the advice of the Attorney-General on whether the emergency situations envisaged were not inconsistent with authorisation and reporting safeguards.<sup>43</sup>

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40. Explanatory Memorandum, p. 33.

41. Senate Standing Committee for the Scrutiny of Bills, Seventh Report of 2010, 23 June 2010, p. 275.

42. Ibid., p. 276.

43. Ibid.

The Attorney-General subsequently advised that:

- given the imminent threat, senior executive authorisation prior to entering premises would be impracticable
- the power cannot be exercised covertly and a seizure notice must be given to the owner of anything taken from the premises; and
- a complaint about the use of the power can be made to the Australian Federal Police, the Australian Commission for Law Enforcement Integrity or the Commonwealth Ombudsman.<sup>44</sup>
- the use of the power will be scrutinised by the courts if proceedings are instituted; and
- while acknowledging the privacy implications of entry without a warrant, the Government has clearly considered the balance between averting a potential terrorist activity with the interference with a person's privacy and decided that it is necessary to give police this new power for national security reasons.<sup>45</sup>

## Schedule 5 - Re-entry of premises in emergency situation

This Schedule makes amendments to the *Crimes Act 1914*, so that in an 'emergency situation' (defined under **proposed subsection 3C(1)**), the time available for law enforcement officers to re-enter premises under a search warrant can be extended to 12 hours.<sup>46</sup> One of the conditions on extension is that it must not result in a period that ends after the expiration of a warrant; (**proposed subparagraph 3JA(3)(b)**).

## Schedule 6 – Amendments relating to bail

This Schedule will amend the *Crimes Act 1914* to include a specific right of appeal on a bail decision for a person charged with terrorism or other national security offences.

**Item 1** of this Schedule will insert **proposed subsections 15AA(3A) – (3D)** which allow the Director of Public Prosecutions or the defendant the right to appeal against a decision granting or refusing bail to a person charged or convicted of an offence covered by subsection (2) (a terrorism offence). This appeal is done on the basis that the authorised person making the bail decision was or was not satisfied that exceptional circumstances exist.

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44. Ibid., p. 277.

45. The Committee noted the avenues available to a person concerned about the exercise of the powers identified in the Minister's response.

46. Explanatory Memorandum, p. 47.

## Schedule 7 – Listings under the Charter of the United Nations Act 1945

**Item 1** will amend subsections 15(1) and (3) to require that the Minister for Foreign Affairs list a person, entity, asset or class of assets if he or she is satisfied ‘on reasonable grounds’ of the prescribed matters. Previously, the provision required the Minister to be satisfied.

This item will implement recommendation 22(b) of the 2006 Parliamentary Joint Committee on Intelligence and Security’s Report *Review of Security and Counter-Terrorism Legislation*. Further, the Explanatory Memorandum notes that this change will bring Australia into line with the international standard for terrorist asset freezing established by the Financial Action Task Force (FATF) in its Special Recommendation III and detailed in the FATF Guidance Document “International Best Practices – Freezing of Terrorist Assets” released on 23 June 2009.<sup>47</sup>

**Item 2** will insert **proposed subsection 15A(1)** outlining the duration and conditions of a of an effective listing. A listing under section 15 ceases to have effect on either the third anniversary of the day on which the listing took effect (if no declaration made under subsection (2)); or the third anniversary of the making of the most recent declaration under subsection (2) in relation to the listing: **Proposed subparagraphs 15A(1)(a) and (b)**. Previously, there was no prescribed expiration period of the listing under section 16 of the *Charter of the United Nations Act 1945*.

## Schedule 8 – Disclosure of national security information in proceedings

Amendments in this Schedule are made to the *National Security Information (Criminal and Civil Proceedings) Act 2004* (the NSI Act) to improve its practical application and ensure the appropriate protection and disclosure of national security information in criminal and civil proceedings. The amendments, as explained by the Explanatory Memorandum relate to:

- the application of the NSI Act to legal representatives
- the role of the Attorney-General under the Act
- flexibility and efficiency in the conduct of court proceedings
- facilitating agreements under section 22 and 38B
- avoiding unnecessary procedures.<sup>48</sup>

**Items 1-14** will insert new definitions and make amendments to definitions of existing specified terms in the NSI Act including ‘court official’, ‘national security information’, ‘federal criminal proceeding’.

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47. Explanatory Memorandum, p. 50.

48. Explanatory Memorandum, pp. 52-53.

Of particular note is **item 8** which proposes to insert a new definition of ‘national security information’ into section 7 of the NSI. This term is presently undefined in the Act but will be defined as: ‘information that relates to national security or the disclosure of which may affect national security’.<sup>49</sup>

**Item 15** will amend existing section 16 of the NSI Act which outlines circumstances when information can be disclosed. The amendments will narrow the scope of the existing permitted circumstances by requiring those circumstances to be specified in a certificate or advice to be issued by the Attorney-General under sections 26,28,38F or 38H. These sections prescribe exclusion certificates for criminal and civil proceedings respectively.

**Item 18** will insert a **proposed subsection 19(1A)** after subsection 19(1) to clarify that the court may make such orders as the court considers appropriate in relation to the disclosure, protection, storage, handling or destruction of national security information in a federal criminal proceeding provided such orders are in the interests of national security and not inconsistent with the Act or its Regulations.

**Item 20** will insert **proposed new Division 1A** (Attorney-General may attend and be heard at federal criminal proceedings). In this new Division, **proposed new section 20A** will expand the scope of the Attorney-General’s existing intervention power (including the Attorney-General’s legal or other representative) in closed court hearings under section 30 of the Act (to be repealed by **item 50**).

The item will also insert **proposed new Division 1B** (Court to consider hearing in camera etc.). To reduce delays arising as a result of the requirement to hold a closed hearing whenever there is an issue relating to the treatment of national security information, **proposed new section 20B** will require the court in criminal proceedings to consider making an order under section 93.2 of the Criminal Code for the hearing to be heard in camera, or another appropriate order to protect national security information under **proposed new subsection 19(1A) (item 18)**.

**Item 21** will facilitate the application to hold a hearing to consider issues relating to the disclosure, protection, storage, handling or destruction in the proceeding of national security information. This may be done by the Attorney-General, the Attorney-General’s legal representative, the prosecutor, the defendant or the defendant’s legal representative (**proposed section 21(1)**).

**Item 26** will amend section 24 of the Act by repealing that section and substituting **proposed subsection 24(1)** and **proposed subsection 24(1A)**. These subsections will clarify that the obligation to notify the Attorney-General of a prospective disclosure of national security information during court proceedings. **Proposed subsection 24(1A)** outlines when a person *need not* give notice about the disclosure of information under subsection 24(1).

**Item 35** clarifies that the definition of ‘potential discloser’ includes the defendant’s legal representative.

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49. See R Ackland, *op. cit.*

Many of **items 36-101** are consequential, minor or technical clarifications for procedural matters or definitions.

**Item 101** amends the existing offence in section 41 (to disclose information after the prosecutor or defendant notifies the Attorney-General that a witness may be called who will disclose information that may affect national security but before the Attorney-General has given a certificate). **Proposed new section 41** will clarify that it is also an offence for a defendant's legal representative to do so. The penalty will remain at two years' imprisonment.

**Items 103 and 107** will insert two new offences into Part 5 of the NSI Act, in **proposed new sections 45A and 46FA**. The offences will make it an offence in federal criminal and civil proceedings to contravene regulations made under section 23 and 38C, attracting a penalty of 6 months imprisonment. The Explanatory Memorandum justifies the imprisonment penalty on the grounds that there are serious consequences of failing to comply with the requirements relating to the storage, handling or destruction of national security information. Furthermore, without a sufficient penalty, the offence would not be a deterrent against failing to comply with the Regulations.<sup>50</sup>

## Schedule 9 – Functions of Inspector-General of Intelligence and Security

Schedule 9 will amend the *Inspector-General of Intelligence and Security Act 1986* to expand the number of agencies that the Inspector-General of Intelligence and Security may inquire into. These amendments are said in the Explanatory Memorandum to be necessary because:

to fully consider an intelligence or security matter, it may sometimes be necessary for the IGIS to consider the role played by a non-Australian Intelligence Community (AIC) department or agency in relation to that matter.<sup>51</sup>

To enable the Inspector-General to consider matters outside of the AIC, it is necessary to repeal and substitute definitions of 'Commonwealth agency', 'employee', 'head', 'member', and 'responsible Minister'. **Items 1-10** do this. **Item 17** repeals current section 9 and replaces it with a new section outlining the additional inquiry functions of the Inspector-General. The new section mirrors the current provision but reflects the modern drafting style. There are to be limits on the Inspector-General's functions, detailed in **proposed section 9AA**. These will mirror the limits imposed under subsection 8(8) in relation to the IGIS' existing inquiry functions. Under the proposed provision, the Inspector-General must not:

- inquire into a matter relating to a Commonwealth agency that occurred outside Australia or before the commencement of the Act without the approval of the Prime Minister or the responsible Minister

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50. Explanatory Memorandum, p. 79.

51. Explanatory Memorandum, p. 82.

- inquire into action taken by a Minister except to the extent necessary to perform the functions of the Inspector-General in relation to the compliance by that ASIO, ASIS, DIGO or DSD with directions or guidelines given to that agency by the responsible Minister ; or
- inquire into a matter, other than a matter that is referred to the Inspector-General under subsection 65(1A) of the *Australian Security Intelligence Organisation Act 1979*, that is, or could be, the subject of a review by the Security Appeals Division of the Administrative Appeals Tribunal.

**Item 31** will repeal subsection 21(1) and substitute **proposed new subsections 22(1) and (1A)**. **Proposed new subsection 21(1)** will mirror existing subsection 21(1), clarifying, however, that the provision applies to an investigation by the IGIS into any Commonwealth agency. Proposed new subsection (2) will clarify that the Inspector-General may remove from a final agency copy of a report any matters that do not relate to the agency concerned.

**Item 41** will repeal subsection 22(4) and substitute **proposed new subsections 22(4) and (5)**. Both subsections will largely mirror existing subsection (4). They require the Inspector-General to provide the responsible Minister, and if the inquiry was conducted at his or her request, the Prime Minister, with a copy of the final agency copy of the inquiry report.

## **Schedule 10 - Consequential amendments relating to the establishment of the Parliamentary Joint Committee on Law Enforcement**

Note that the provisions in this Schedule do not commence unless and until the commencement of the *Parliamentary Joint Committee on Law Enforcement Act 2010*.

**Items 1-10** in this Schedule make amendments to the following Acts to enable the operation of the newly established Parliamentary Joint Committee on Law Enforcement: *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*, *Australia Crime Commission Act 2002*, *Australian Federal Police Act 1979* and the *Proceeds of Crime Act 2002*. These amendments include transitional arrangements for the Parliamentary Joint Committee on the Australian Crime Commission that is to be replaced by the Parliamentary Joint Committee on Law Enforcement.

## **Concluding comments**

There was much anticipation at the introduction of this Bill during the previous Parliament. After noticeable silence on national security legislative reform, it was hoped that this Bill would remedy confusing or oppressive provisions in the terrorism law landscape. However, the Bill has given only little consideration to the issues that have been plaguing practitioners and academics for a number of years. It contains mostly technical and procedural amendments that have long had bi-partisan support in historical Committee reports. While it is a very detailed and highly complex Bill in parts, it fails to touch on any reform to controversial provisions such as the control orders regime or the terrorist organisation offences. The changes the Bill does make will likely bring more certainty to the investigation and prosecution of terrorism offences.

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